Editor's note: Reconsideration granted; decision sustained by order dated Feb. 22, 1980 -- See 44 IBLA 177A through D below.

TENNECO OIL CO.
CORDILLERA CORP.

IBLA 79-69 Decided November 30, 1979

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, holding oil and gas lease W 037767-B terminated for nonpayment of rental.

Affirmed as modified.

1. Oil and Gas Leases: Extensions -- Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination -- Rules of Practice: Appeals: Effect of

   An oil and gas lease in its extended term because of the termination of an approved unit plan to which it was committed, on which lease there is no well capable of production in paying quantities, terminates automatically by operation of law where the annual rental is not paid on or before the anniversary date of the lease. The pendency of an appeal regarding the termination date of the extension does not excuse the failure to maintain the lease in good standing by timely payment of the annual rental.

2. Oil and Gas Leases: Suspension -- Oil and Gas Leases: Termination

   There is no authority to suspend an oil and gas lease terminated by operation of law for failure to pay the annual rental on or before the anniversary date of the lease where no application for suspension was filed before the lease terminated.

APPEARANCES: John W. Coughlin, Esq., Kutak, Rock & Huie, Denver, Colorado, for appellants.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

This appeal is brought from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 20, 1978, holding that oil and gas lease W 037767-B terminated effective January 31, 1977, for nonpayment of rental beyond that date and because there was no evidence of production which would further extend the lease. Appellant Tenneco Oil Company (Tenneco) is the holder of record title to the subject lease. This appeal is also brought by Cordillera Corporation (Cordillera), the holder of an interest in the lease by assignment from Tenneco, which assignment was filed with BLM but which has not been approved. An understanding of the basis of the decision and appellants' reasons for appeal require consideration of the complex history of this lease.

Lease W 037767-B was created by an assignment of record title to 40 acres of land formerly contained in lease W 037767-A. The base lease out of which these leases were created by partial assignment issued with an effective date of January 1, 1956. The term of lease W 037767-B was extended by virtue of the assignment through November 30, 1967. 43 CFR 3107.6-2 (formerly 43 CFR 3128.5).

The term of the subject lease was further extended to November 30, 1969, by the conduct of drilling operations on the Sugar Creek Unit to which the lease was committed. During the term of the latter extension, a discovery of gas in paying quantities was made in the unit and the lease continued in existence by reason of production from the unit.

A decision of the Area Oil and Gas Supervisor (Supervisor), U.S. Geological Survey (Survey), dated October 14, 1976, held that the Sugar Creek Unit Agreement, of which the subject lease was part, terminated effective January 31, 1975, the last day of the last month in which production of gas was achieved in the unit. This decision was appealed by Tenneco and Cordillera on the ground that the date of unit termination should have been July 8, 1976, the date on which Tenneco finally ceased reworking operations on the Sugar Creek Unit No. 1 well.

Meanwhile, BLM, acting on the basis of the Supervisor's determination, issued a decision dated November 1, 1976, advising lessee that lease W 037767-B was extended through January 31, 1977, pursuant to 30 U.S.C. § 226(j) (1976) and the regulations at 43 CFR 3107.5, as a consequence of the termination of the Sugar Creek Unit approved by Survey effective January 31, 1975. Shortly thereafter the lease account was returned to BLM by Survey with the notation that rental (minimum royalty) had been paid through December 31, 1975. At that

point BLM followed up its prior action with a further decision dated November 29, 1976. The latter decision reaffirmed the extension of the lease to January 31, 1977, on the basis of the termination of the unit agreement on January 31, 1975, and further stated that lease rental for the period from January 1, 1976, through December 31, 1976, in the amount of $40 and rental from January 1, 1977, through January 31, 1977, in the amount of $3.34 was presently due and payable.

On December 13, 1976, Tenneco filed an appeal with BLM of its decision extending lease W 037767-B through January 31, 1977, alleging that it was appealing the Survey decision that the Sugar Creek Unit terminated on January 31, 1975. Tenneco asserted that the proper date of termination of the unit agreement was July 8, 1976, that the lease should thus be subject to extension through July 8, 1978, and that the BLM decision was premature pending the appeal of the Survey decision on which it was dependent.

In addition, on December 21, 1976, Tenneco paid the rent for lease W 037767-B in the amount of $43.34 for the period from January 1, 1976, through January 31, 1977, as required by the BLM decision of November 29, 1976.

In a decision dated March 7, 1977, Tenneco Oil Company, 29 IBLA 157, the Board set aside the decision of the BLM extending the subject lease through January 31, 1977, as premature. The basis of the decision was the pending appeal to the Director, Survey, of the Supervisor's decision regarding the termination date of the unit and the inability to determine the extension date of the lease in the absence of a date for termination of the unit.

Thereafter, on May 10, 1977, the Director of Survey affirmed on appeal the decision of the Supervisor with respect to the termination date of the unit. Further appeal of the Director's decision was brought to the Board, where the case record was received on July 11, 1977. By Order of August 3, 1978, the Board in Tenneco Oil Company (IBLA 77-386) modified the decision of Survey to hold that the unit terminated July 8, 1976. The Board found the record inadequate to support the Survey decision and, though noting that certain evidentiary gaps in the record might be clarified by ordering an evidentiary hearing pursuant to 43 CFR 4.415, declined to order a hearing in view of the apparent mootness of the controversy resulting from the passage of more than 2 years since the termination of the unit. 1/

1/ The primary significance of the unit termination date in this case is as the commencement date of the 2-year lease extension which follows termination of a unit agreement to which a lease is committed. 43 CFR 3107.5. After passage of 2 years from the unit termination date argued by appellant, the lease would have terminated in any event in the absence of production.

Thereafter, BLM issued its decision of October 20, 1978, holding the lease terminated, which decision is the subject of this appeal. Appellants' statement of reasons for appeal asserts that the BLM decision that lease W 037767-B terminated for lack of production was unjust because the termination date of the unit (and the extension date of the lease) was under appeal and Survey would not grant an application to drill on the lease after January 31, 1977, the date it had decided the lease expired. 2/ A supporting letter from Survey's District Engineer has been submitted confirming that he could not have approved drilling after January 31, 1977. Appellants contend that they were deprived of the right to drill on the lease from January 31, 1977, until July 8, 1978, the proper date for termination of the extended term of the lease, because the appeal involving the termination of the unit on which the lease extension is based was not finally decided until August 3, 1978, after the lease would have expired in any event.

The Board is requested by appellants to grant an extension of the term of the subject lease for a period equal to the length of time between January 31, 1977, and July 8, 1978, when appellants contend they were deprived of the opportunity to place the lease in a producing status. Appellants contend this is necessary to avoid prejudice to them from the delay in deciding an appeal in which they prevailed until after the date by which the lease would have expired in any event.

Finally, appellants argue that there is no requirement that lessee pay the rental for an oil and gas lease in its extended term where the rent is due in connection with the part of the extended term of the lease which is in issue on appeal. Appellants point out that the effect of a decision is ordinarily suspended during the period when an appeal is pending. 43 CFR 4.21. Appellants contend there was no obligation to pay rent for a lease which may or may not have expired.

This appeal raises two critical issues. The first is whether the appeal of the decision with respect to the extension (expiration) date of the lease has the effect of suspending the timely rental payment requirement during the extended term of the lease in issue on appeal. The second question is whether a suspension (extension) of the term of the lease may be granted where application therefore is not made until after termination of the lease.

[1] It is provided by statute that the failure of the lessee to pay the annual rental for an oil and gas lease on which there is no well capable of producing oil or gas in paying quantities on or before

2/ No allegation is made that the leasehold contained a well capable of production in paying quantities at any time from January 1977 to the present.

the anniversary date of the lease shall result in the automatic termination of the lease by operation of law. 30 U.S.C. § 188(b) (1976). Lessee was specifically advised by the BLM decision dated November 29, 1976, following return of the lease account from Survey, that lease rental was due for the period from January 1, 1976, through December 31, 1976, and from January 1, 1977, through January 31, 1977. Although lessee appealed the date for the extension of the lease, the requirement for payment of rental was not appealed and on December 21, 1976, the lessee paid the rental.

The appeal of the decision of BLM with respect to the date for extension of the lease had the effect of suspending this decision regarding the extension date (expiration date) of the lease pending resolution of the appeal. 43 CFR 4.21. However, this did not serve to suspend the statutory requirement that the lessee maintain the lease in good standing subject to automatic termination of the lease pursuant to 30 U.S.C. § 188(b) (1976) for failure to make timely payment of the annual rental. Jack L. McClellan, 34 IBLA 53, 57 (1978).

The term of a lease committed to an approved unit plan, which lease is in effect at the termination of the unit plan, is subject to extension automatically by operation of statute where the prescribed facts exist. 30 U.S.C. § 226(j) (1976). No notice from BLM or Survey is necessary to effectuate this, but maintenance of the lease in good standing by timely payment of the annual rental is a prerequisite to continued existence of the lease during the extended term. See Jack L. McClellan, supra at 57. The provision of 30 U.S.C. § 188(b) (1976), providing for automatic termination of an oil and gas lease not containing a well capable of producing oil or gas in paying quantities, applies to a lease subject to extension because of termination of the approved unit agreement to which it is committed even though notice of the extension was not given to the lessee in advance of the anniversary date when the rental payment was due. Jack L. McClellan, supra. A fortiori, the lease is subject to termination for failure to pay the rental timely in the present case, where lessee had timely notice of the extension of the subject lease and the consequent obligation to pay rental, the only issue remaining being the date when the extension expired.

This case may be distinguished from those in which it has been held that the automatic termination provision does not apply because, due to other contingencies, additional rental becomes due on a date other than the anniversary date of the lease continuing in effect, and the lessee has not been advised of the further extension of the lease term and of the obligation to pay additional rental. American Resources Management Corp., 36 IBLA 157 (1978); C. W. Trainer, 69 I.D. 81 (1962). The anniversary date of a lease, which is the operative date for purposes of the automatic termination provision for nonpayment of the annual rental, does not change when an event occurs which extends the term of the lease. C. W. Trainer, supra at 83. In

the present case the term of the lease became subject to extension until July 8, 1978, by virtue of the termination of the unit. Therefore, payment of the full annual rental for the lease year was due by the anniversary date of January 1, 1977, and the lease terminated by operation of law in the absence of payment.

Appellants' situation is further distinguishable from those cases where the automatic termination provision has been held not to apply because lessee had no way of knowing that the obligation accrued, Solicitor's Opinion, 64 I.D. 333 (1957), or was only notified of the facts causing the rent to be due on the anniversary date after the date had passed. Husky Oil Company, 5 IBLA 7, 79 I.D. 17 (1972). Appellant was advised by BLM decision of November 1, 1976, that the term of lease W 037767-B was extended through January 31, 1977. Following return of the lease account from Survey to BLM, lessee was further notified of the obligation to pay lease rental through the expiration date of January 31, 1977. If, as lessee contended successfully in the prior appeal, the lease was subject to extension through July 8, 1978, then rental in the amount of $40 was due on or before the anniversary date of lease, January 1, 1977, for the full lease year from January 1, 1977, to December 31, 1977.

The prorated 1-month rental which lessee paid was not sufficient. Therefore, the lease would ordinarily have terminated automatically by operation of law on January 1, 1977, because of lessee's failure to pay the annual rental. However, it may be argued that payment of the prorated rental for the month of January 1977 prior to the anniversary date, pursuant to the BLM decision, brings the lease within the exception to automatic termination created by section 1 of the Act of May 12, 1970, 30 U.S.C. § 188(b) (1976). Where the payment, though deficient, was

> made in accordance with a * * * decision which has been rendered by [the Secretary] and such * * * decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate unless * * * the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary.

30 U.S.C. § 188(b) (1976). Even assuming the timely payment of the prorated rental for the month of January 1977 pursuant to the BLM decision precluded automatic termination of the lease on the anniversary date of January 1, 1977, the lease must be held to have terminated on the next anniversary date, January 1, 1978, by which date payment of the advance rental for the next lease year was required. 30 U.S.C. § 188(b) (1976); 43 CFR 3103.3-2(e)(1).

[2] The Secretary of the Interior is authorized by statute to suspend oil and gas leases. 30 U.S.C. § 209 (1976). No suspension of an oil and gas lease will be granted in the absence of a well capable

of production except where the Secretary directs a suspension in the interest of conservation. 43 CFR 3103.3-8(a). In the event that the Secretary grants a suspension of operations and production, rental and minimum royalty payments will be suspended and the term of the lease will be extended by adding thereto the period of suspension. 30 U.S.C. § 209 (1976); 43 CFR 3103.3-8. However, the Department lacks authority to suspend a lease which terminated by operation of law for failure to pay the advance rent when no suspension application was filed before the lease terminated. Jones-O'Brien, Inc., 85 I.D. 89 (1978); United Manufacturing Co., 65 I.D. 106 (1958). Accordingly, there is no basis in the record for favorable action on appellants' request (contained in the statement of reasons for appeal) for suspension of the lease. Appellants' recourse was to file an application for suspension prior to termination of the lease for nonpayment of rental.

Although the delay in adjudication of lessee's prior appeal regarding the termination date of the unit and the consequent extension date of the lease is regrettable, it is clear in the context of this case that appellants were not prejudiced thereby. The subject lease terminated automatically by operation of law for nonpayment of the rental. An application for suspension of the lease which would have extended the term thereof might have received favorable attention if made in a timely manner prior to termination of the lease. However, the lessee failed to take necessary and appropriate action to protect its rights and they cannot now be revived retroactively.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Newton Frishberg
Chief Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

February 22, 1980

IBLA 79-69	:	W 037767-B
	:	
TENNECO OIL CO.	:	Oil and Gas
	:	
CORDILLERA CORP.	:	Petition for Reconsideration
	:	Granted; Decision of November
	:	30, 1979, 44 IBLA 171, sustained

ORDER

Counsel has filed a petition for reconsideration of this Board's decision in the subject case, Tenneco Oil Co., 44 IBLA 171 (1979). The material facts of this case are set forth in substantial detail in our prior opinion. The basis for the petition is the contention of petitioner that the circumstances of the subject case are governed by the precedents established in American Resources Management Corp., 36 IBLA 157 (1978); C.W. Trainer, 69 I.D. 81 (1962); and Husky Oil Company, 5 IBLA 7, 79 I.D. 17 (1972). Petitioner disputes the Board's finding that the subject case is distinguishable from those precedents and, therefore, argues that the Board should reconsider and reverse its decision that the lease at issue terminated automatically for non-payment of rental on the anniversary date. The petition for reconsideration is hereby granted in the interest of clarifying the basis for the Board's decision in this matter.

The cases cited by petitioner fall into two categories. The decisions in American Resources Management Corp., supra, and C. W. Trainer, supra, are precedent to the effect that the automatic termination provision does not apply in those situations where, due to other contingencies, additional rental becomes due on a data other than the anniversary date of the lease continuing in effect and lessee has not been given notice of the extension and an opportunity to pay the rent. The decision in Husky Oil Company, supra, is part of a body of precedent that a decision retroactively placing a lease in a rental status cannot render the automatic termination provision operative where the lease was not in a rental status at the time of the anniversary date.

In C. W. Trainer, supra, the leases issued with an anniversary date of December 1, 1948. As a consequence of segregation by partial assignments, effective October 1, 1958, the lease terms were extended to September 30, 1960. The annual rate for the leases was timely paid on a pro rate basis through that date. A producing well was completed one of the segregated leases on September 29, 1960, thus making the term of each of the leases subject to a further two-year extension. On appeal from a decision holding the nonproducing segregated leases terminated automatically for nonpayment of rental by September 30, 1960, the Department held that the automatic termination provision of 30 U.S.C. § 188 (1976) does not apply

> where due to other contingencies additional rental became due on a date other than the anniversary date of the lease. To so construe the provision would be to disregard the plain wording of the statute that the "anniversary date of the lease" is the controlling date.

C. W. Trainer, supra at 83. The decision recites that the lease rental for the balance of the twelfth lease year and the entire thirteenth lease year was paid on October 25, 1960, well in advance of the anniversary date of December 1, 1960. It is in this context, where rental payments became due on a date other than the anniversary date of the lease, that the Department held "that the holders of such extended leases should be given notice that because of the extension of their leases additional rent is due and the lessees should be given a reasonable time during which to place their lease accounts in good standing." C. W. Trainer, supra at 83. This holding does not refer to the failure to pay the annual rental on the next anniversary date of the extended lease. This distinction is recognized in the regulations at 43 CFR 3103-2(e).

The decision in American Resources Management Corp., supra, similarly held that the automatic termination provision does not apply

> where, due to other contingencies, additional rental may become due on a date other than the anniversary date of the lease still in effect. The lessee must be advised of the further extension of the lease term and of the obligation to pay additional rental from [the date when the extension commenced].

American Resources Management Corp., supra at 159.

These precedents are distinguishable from petitioner's case in which the extension of the lease to July 8, 1978, as a consequence of the termination of the unit on July 8, 1976, was contingent upon payment of the annual rental by the anniversary date of the lease. The subject lease terminated for failure to pay the annual rental by the lease anniversary date during the extended term of the lease, not for failure to pay the balance of the annual rental for a year in which the prorated annual rental had already been paid. 43 CFR 3103.3-2(e)(1). As noted in our prior decision in this case, the facts bring it within the scope of the Board's holding in Jack L. McClellan, 34 IBLA 53 (1978), to the effect that an oil and gas lease is made subject to extension by the occurrence of one of the events designated in the statute, 30 U.S.C. § 226(j) (1976), but the timely payment of the lease rental by the anniversary date of the lease is necessary to preserve the lease during the extended term, in the absence of which the lease terminates automatically by operation of law. Jack L. McClellas, supra at 57.

The case of Husky Oil Company, supra, cited by petitioner, involved a lease on which development of a producing well changed the status from rental to royalty payments. Subsequent to development of the well and after the next anniversary date of the lease on which advance rental would have been due if the lease remained in the rental status, the Bureau of Land Management (BLM) issued a decision retroactively announcing approval of a unit agreement embracing part of the lease acreage (including the producing well) and the consequent segregation of the leased lands not committed to the unit into a separate lease effective prior to the anniversary date. In the absence of a producing well, the segreged lease was placed in a rental status and the BLM held the segregated lease was placed in a rental status and the BLM held the segregated lease terminated automatically for nonpayment of rent by the anniversary date. On appeal the Board held that the automatic termination provision could not be rendered operable to terminate the lease for nonpayment of rent where the lease was changed from a producing (royalty) to rental status by retroactive decision of the BLM issued after the anniversary date of the lease with an effective date prior to the anniversary date. Husky Oil Company, supra at 19. In support of this principle, the Board quoted from the Departmental decision in Roy M. Eidal, A-29300 (February 19, 1962):

> If a lessee is not obligated to pay the annual rental on the day it would normally fall due, the automatic termination provisions of the statute do not apply to his lease. If it is later determined that the well which protected the lease

> ought not have been part of it, the lessee is obligated to pay the rental due, but only after he has been notified of the change circumstances and the rental demanded of him.

Husky OIl Company, supra at 19.

Petitioner's case is distinguished from these precedents by the absence of a retroactive decision changing the rental status of the lease to require payment of rent by the anniversary date when such payment was not required by the facts existing on the anniversary date. The fact that payment of annual rental was required to preserve the lease was established by BLM decision of November 29, 1976, and petitioner paid such rental through January 31, 1977.

Petitioner succeeded in establishing in its prior appeal that the unit agreement terminated July 8, 1976, which had the legal effect of making lease W 037767-B subject to extension through July 8, 1978. However, a lease in its extended terms on which there is no well capable of producing oil or gas in paying quantities is subject to automatic termination by operation of statute for failure to pay the annual rent by the anniversary date of the lease. 30 U.S.C. § 188(b) (1976). Lessee must maintain the lease in good standing by timely payment of the annual rental in accordance with the provisions of statute and the lease terms in order to preserve the statutory lease extension. Jack L. McClellan, 34 IBLA 53, 57 (1978).

As discussed above, petitioner has failed to show that the decision of this Board improperly applied either the statutory law or precedent established in past decisions. Therefore, the Board's decision of November 30, 1978, 44 IBLA 171, is sustained.

Newton Frishberg
Chief Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge

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